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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Appellant,

vs.

GLENN C. FETTER AND FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

SAMUEL GOLDENBERG,
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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes,

Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation,

Defendants and Respondents.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Wisconsin in this cause.

Opinions Below

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 35; 42 N. W. 2d 452. A copy

of the opinion is attached hereto as Appendix A. The opinion of Circuit Judge Chas. L. Aarons, Milwaukee County, is attached hereto as Appendix A-1.

Jurisdiction

The decision of the Supreme Court of the State of Wisconsin was filed on May 2, 1950; a motion for rehearing was denied on June 30, 1950. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257.

Question Presented

May a state consistently with the Full Faith and Credit Clause, Section 1, Article IV, United States Constitution, and the Due Process Clause, Section 1, Fourteenth Amendment, United States Constitution, forbid access to its courts to enforce a cause of action for a wrongful death based upon the statutes of a sister state, where the injuries and death occurred in that other state?

Statutes Involved

Section 331.03 of the Revised Statutes of the State of Wisconsin is set forth in Appendix B.

Statement of Facts

Harold G. Hughes, a minor, a resident of Milwaukee, Wisconsin, died on January 11, 1948, in Effingham, Illinois, as the result of injuries sustained in a collision in Effingham County, Illinois, on January 9, 1948. Decedent Hughes was riding as a passenger in the car of the defendant Fetter at the time of the accident.

The driver of the car, Glenn C. Fetter, was also a resident of Milwaukee, Wisconsin.

Corbin D. Hughes was appointed administrator of his son's estate by the County Court of Milwaukee County, Wisconsin, and commenced this action for wrongful death based on the Illinois Wrongful Death Statute, Sections 1 and 2 of Chapter 70, Smith-Hurd Illinois Annotated Statutes. The applicable Illinois statute is set forth in Appendix C.

The defendants denied negligence; later the defendants moved for summary judgment in the Circuit Court of Milwaukee County upon the sole contention that an action could not be maintained in Wisconsin for a wrongful death caused in Illinois because of the provision of Section 331.03 of the Wisconsin Statutes.

Plaintiff contended in the trial court that this action was not brought under the Wisconsin Wrongful Death Act but was brought under the Illinois Statute, and that the proviso found in Section 331.03 of the Wisconsin Statutes did not prohibit the bringing of this action. The trial court sustained defendants' position and granted defendants summary judgment and dismissed the plaintiff's complaint on the merits.

The Supreme Court of the State of Wisconsin (two justices dissenting) construed the Wisconsin statute to prohibit access to its courts in enforcing an action for wrongful death based upon the statutes of Illinois, and affirmed the judgment of the trial court, summarily dismissing the plaintiff's complaint on the merits.

The Questions Are Substantial

Both the Circuit Court and the Supreme Court of Wisconsin in its decision dated May 2, 1950, considered the question whether Section 331.03 violates the Federal Constitution in denying enforcement in Wisconsin of a cause of action for wrongful death conferred by a statute of the

State where death was caused. Both opinions relied heavily on *Doughterty* v. *McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619; and the two United States Supreme Court cases there quoted, namely, *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, and *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142; 28 Sup. Ct. 34; 52 L. Ed. 143.

A line of decisions of the United States Supreme Court, much more recent than *Paul* v. *Virginia* or *Chambers* v. *Baltimore & Ohio Railroad Co.*, holds that the Full Faith and Credit Clause would require Wisconsin to open the doors of its courts and permit enforcement of the wrongful death statute of a sister State because a statute is a "public act" within the meaning of the full faith and credit provision of the United States Constitution; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 155; 76 L. Ed. 1026, 1032; 56 Sup. Ct. 571; 82 A. L. R. 696.

In *Broderick* v. *Rosner*, 294 U. S. 629; 79 L. Ed. 1100; 56 Sup. Ct. 489; 100 A. L. R. 1133, 1140, footnote 3, it is pointed out that the *Chambers* case did not consider the Full Faith and Credit Clause.

The language of *Broderick* v. *Rosner*, *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, 210; 86 L. Ed. 152, 158; *Angel* v. *Bullington*, 330 U. S. 183; 67 Sup. Ct. 657; 91 L. Ed. 832, shows that both Full Faith and Credit and Due Process clauses forbid a state to deny access to its courts solely because the cause of action asserted is based on the law of a sister state rather than that of the forum.

Wisconsin statute, Section 331.03, is an enactment of the principle of Lord Campbell's Act, and has existed in its present form since 1857. Wisconsin Session Laws 1857, Ch. 71, Sec. 1. Prior to the decision herein appealed from, Wisconsin uniformly had enforced the wrongful death statutes of other states. *Bain* v. *Northern Pacific Rail-*

road Co. (1904), 120 Wis. 412; 98 N. W. 241; *Bernard* v. *Jennings* (1932), 209 Wis. 116; 244 N. W. 589; *Sheehan* v. *Lewis* (1935), 218 Wis. 588; 260 N. W. 633. Section 331.03 of the Wisconsin Statutes created a right of action for wrongful death caused within the State of Wisconsin. The language of the statute limiting its application to deaths caused within Wisconsin has now—for the first time in the ninety years since its enactment—been construed by the Supreme Court of Wisconsin as a legislative mandate to refuse recognition and enforcement to the wrongful death statute of any other state, unqualified by any circumstances such as that the death-causing tort feasor has fled the *locus delicti* and may be amenable to process only in Wisconsin.

No question of a state's "public policy," in the ordinary sense, is involved. It is recognized that if the state of the forum condemns the moral quality of a transaction which occurred beyond its borders, the forum may constitutionally refuse to sanction or fructify it just as if the transaction had occurred within its borders. (See *Restatement, Conflict of Laws,* Section 612, pp. 731-732) No such question is involved here. Wisconsin has no public policy opposed to collection of damages for wrongful death as such. On the contrary Wisconsin was one of the first states to adopt, and has retained by Section 331.03, the principle of Lord Campbell's Act as to death caused within the state.

Wisconsin's refusal to allow its courts to entertain actions brought under the Wrongful Death Statute of a sister state is therefore one of refusal to enforce a transitory right or cause of action solely because that right arose outside its borders under the laws of another state.

II

The vice of the decision of the Supreme Court of Wisconsin is that it absolutely nullifies the Full Faith and Credit provision of the United States Constitution.

The present case involves a statute of Wisconsin construed as denying access to its courts for the enforcement of an action for damages for wrongful death caused in any other state.

The tremendous volume of interstate travel by automobile, and the incidence of frequently fatal injury therein, make the question of the validity of Wisconsin's denial one of general and practical importance: May a state where the tort feasor lives or is served with process refuse access to its courts for enforcement of rights conferred by the statutes of the state where the wrongful death was caused?

But the principle of constitutional law involved affects not only actions for wrongful death. If a state may close its doors to such actions (to enforce rights conferred by the statutes of a sister state) it may deny access to its courts to obtain redress for any kind of injury caused by any kind of tort—whether to person or property—simply because the wrongful act was committed outside its borders, and because the remedy therefor is conferred not by the laws of the forum but of a sister state. If the Federal constitution does not forbid a state to refuse enforcement of transitory causes of action for tort committed elsewhere, why may not a state refuse to enforce any rights acquired under contract made in another state and pursuant to the laws of that other state?

It is not suggested that Wisconsin or any other state would go so far as to attempt to isolate itself from the rest of the Union by disclaiming interest in the protection of any and all rights orginating in acts or transactions occurring

outside its borders. But may any state, as to *any* act occurring outside its borders, and therefor governed by the law of another state, refuse to enforce that law, which is the same or substantially the same as the forum applies to acts occurring within its borders?

It is submitted that, in the absence of any difference in judgment ("public policy") between the law of the forum and the law of the State where the act or transaction took place as to its moral quality (none exists between the statute of Wisconsin and the statute of Illinois here involved) every state is required to give full faith to the rights created by the statutes of every other state when invoked in the forum; that, with respect to the laws of the sister state involving no conflict in substantive law with the law of the forum, no state is free to disclaim responsibility for enforcing the laws of such sister state; and that Section 1 of Article IV and Section 1, Fourteenth Amendment, United States Constitution, require the striking down of any state statute which directs its courts to close their doors to, or refuse to recognize and enforce therein, the statute of a sister state with relation to acts done in that sister state, especially while enforcing a similar statute with relation to similar acts done within the state of the forum.

III

Justice Cardozo, speaking for the New York Court of Appeals, held that a right of action for wrongful death given by a sister state, where the wrongful death occurred, is a property right. (See *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; 120 N. E. 198.)

Wisconsin should enforce property rights acquired in other states. To refuse to enforce in Wisconsin a property right acquired in another state is to leave the plaintiff

without a remedy and takes away his property without due process of law.

It is submitted that Section 331.03 of the Wisconsin Statutes, as construed by the Supreme Court of the state of Wisconsin, fails to give full faith and credit to the public acts of a sister State in violation of Section 1, Article IV, United States Constitution. Wisconsin, in denying access to its courts in enforcing a property right that the plaintiff acquired under the laws of Illinois, is, in effect, taking away the plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

SAMUEL GOLDENBERG,
Counsel for Plaintiff-Appellant.

APPENDIX "A"

STATE OF WISCONSIN: IN SUPREME COURT

AUGUST TERM, 1949

No. 187

CORBIN D. HUGHES, Adm'r. of the Estate of Harold G. Hughes, *Appellant*,

v.

GLENN C. FETTER, et al., *Respondents*

Appeal from judgment of the Circuit Court for Milwaukee County, Charles L. Aarons, Circuit Judge. Affirmed.

Corbin D. Hughes, Administrator of the estate of Harold G. Hughes, brought this action against Glenn C. Fetter and Farmer Mutual Automobile Insurance Company, a Wisconsin corporation, to recover damages for wrongful death based on the Illinois wrongful death statute, sections 1 and 20, Chapter 70, Smith-Hurd Illinois Annotated Statutes. The action was begun July 7, 1948. Defendant moved for summary judgment, and judgment was directed dismissing the plaintiff's complaint on the merits. November 25, 1949. Plaintiff appealed.

Judge Aarons, who heard the matter, states the problem as follows:

"Defendants' motion for summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948), is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham county, in the State of Illinois, on January 8, 1948. Defendants contended that the action is not one 'brought for a death caused in this State' and is therefore not maintainable by reason of a proviso contained in section 331.03 Wis. Stats. It appears to be conceded

that both Hughes, the decedent, and the defendant Fetter were Wisconsin residents at the time of the accident and that said defendant still resides in this state.

"The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action on the Illinois death statute."

FAIRCHILD, J. The Wisconsin statute, section 331.03 which the learned trial judge ruled prevented the maintenance of the action and required a dismissal of the complaint does permit recovery for death by wrongful act. But it also contains the provision "that such action shall be brought for a death caused in this state." The question is now raised whether for a death in Illinois this action can be maintained in Wisconsin notwithstanding that provision in our statute.

The right to recover for death by wrongful act is purely statutory. The words of the statute, "provided that such action shall be brought for a death caused in this state" seem plain enough to bar cases not within its terms, and to exclude actions where the wrongful act resulting in death occurred in another state. This must be so, unless that provision is unconstitutional, or unless the rules of comity placed an obligation upon the courts of this state to voluntarily try a case arising under the Illinois wrongful death statute.

First, with respect to the constitutionality of the provision: We agree with the learned trial judge that the enactment is not in contravention of the full faith and credit clause of the Federal Constitution or of paragraph 1, section 2 of Article IV providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. It has been repeatedly declared to be the law that it was not intended by the provisions of the Federal Constitution referred to to give to the laws of one state any operation in other states except by permission, express or implied, by those states. *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357. The rule applies with full force to statutes giving a right of action for death by the wrongful act of another.

The policy of Wisconsin against the maintenance of such an action having been created positively in a statute, that policy must prevail. "Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states." *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In the case of *Dougherty* v. *American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L.R.A. 1915 F. 955, the Illinois court, in commenting on the Ohio decision, said: "The reason of that decision as to the right of a State to exclude actions of the kind here in question fully sustains the validity under the Federal Constitution of the provision of the injuries act above referred to. . . . It necessarily follows that the trial court rightly held that the courts of this state are without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed."

The learned trial judge in the case at bar said that "the views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers* case, *supra*) and many other cases cited in the opinion (in *Dougherty* v. *American McKenna Process Co.*, *supra*) also received sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state. . . . *Finney* v. *Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839; *Robertson* v. *Chicago etc. R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 604-606, 37 L. Ed. 829, 833); *Bain* v. *Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox* v. *Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund* v. *Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. *McAdam*, 142 Wis. 114, 121; *Bartlett* v. *Collins*, 109 Wis. 477, 482; *Porte* v. *C. & N. W. R. Co.*, 162 Wis. 446, 451.

Now as to the matter of comity: In this state the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law,

morals or policy of the state where the action is sought to be maintained. However, if the policy of the forum has been expressed positively in a statute, that policy must prevail. "When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what the statute indicates." *Harding* v. *American Glucose Co.*, 182 Ill. 551, *People* v. *Shedd*, 241 Ill. 155; *Ziegler* v. *Illinois Trust and Savings Co.*, 245 Ill. 180; *Miner on Conflict of Laws*, section 6, page 10. By virtue of the doctrine of comity, rights acquired under statute enacted or judgment rendered in one state will be given force and effect in another, unless, as said, against policy or laws of the state, prejudicial to interests of its citizens or against good morals and natural justice; comity being a rule of practice, however, and not a rule of law. *In re Chase*, 141 S.E. 471, 473, 195 N.C. 143. The doctrine of comity results in recognition of a decree of a different state not entitled to full faith and credit. It is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens. *11 Amer. Jur., section* 183, page 495, *Corpus Juris Secundum*, Vol. 15, page 245, *Strawn Mercantile Co.* v. *First Nat. Bank, Tex.*, 279 S.W. 473, 474; *Baker River & S. R. Co.* v. *Nichols*, 99 P. 876, 877, 51 Wash. 619.

Plaintiff in support of his position here urges the doctrine that all legislation is *prima facie* territorial and does not operate beyond the jurisdiction in which it is enacted. He cites *Bernard* v. *Jennings*, 209 Wis. 116, 120. The distinction between the facts of that case and the instant one is obvious. The learned trial judge, because of the stress placed upon the matter of extraterritorial legislation, thought it appropriate to point out that as to the Wisconsin statute there is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force, however, whenever within its own boundaries claims are asserted. As to the Illinois statute, he said: "In so far as its enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in

this state; otherwise the Illinois statute would be given extraterritorial force."

Plaintiff's counsel directs attention to the case of *Sheehan* v. *Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state after the enactment of our statute. It appears that in those cases the particular point involved and here considered was not advanced. Those cases, therefore, cannot be considered as authoritative upon the question here presented. They did not change the statute. In the *Sheehan case, supra,* it appeared that Illinois, where the injury causing death occurred, then had the same statute which has been referred to in this case, prohibiting actions in that state to recover damages for death occurring outside of the state. In that case a doctrine of reciprocity was contended for by the defendant to bar the action in Wisconsin, since Illinois under its statute would have barred an action in that state for a death occurring in this state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added these words: "Wisconsin has no such statute." There was then quoted the first paragraph of section 2 of Article IV, U. S. Constitution, and we added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." *Sheehan* v. *Lewis, supra,* p. 593. It is apparent that the full contents of section 331.03 was not given due consideration. And it is evident that the decisions resulted from circumstances similar to those referred to in *Kelso Company* v. *Ellis*, 224 N. Y. 528, 537, where Judge Pound said: "Even in this court a dictum in *Bank of America* v. *Waydell* (187 N. Y. 115, 120) reveals the habit of bench and bar to look to cases rather than statutes . . . until attention is sharply directed" to the existence of a policy fixing statute.

The only case brought to the attention of our court dealing directly with the proviso contained in section 331.03 Wis. Stats. is *Rudiger* v. *Chicago, et R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action should be maintained

in the Wisconsin courts, if the death was caused in this state; and we held that the "object and the effect of the proviso in our statute was to render the action local and limit it to cases where death was caused by actions committed or occurring within this state, without regard to whether the death occurred within or without it."

The suggestion that the doctrine of *stare decisis* ought to control our decision upon the matter here involved is without weight. *Reiter* v. *Grober*, 173 Wis. 493. We do not find that a rule of property was involved, nor do we find any basis existing for the court to review the conclusion reached by the legislature. Its findings are not, under the circumstances, subject to judicial review. Therefore in deference to the determination of the legislature and the plain requirements of its acts, any statements made in our opinions in cases heretofore treating with a similar situation which are contrary to the opinion here expressed are withdrawn. As pointed out in the opinion of the learned trial judge, the precise point relating to the statute was not considered in the Wisconsin cases relied upon by the plaintiff.

The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks the benefit of a remedy denied him by the law of the forum. *Estate of Seybold*, 223 Wis. 192. As is shown by the above cited cases, the conclusion here reached is not only in accordance with the ruling of the U. S. Supreme Court and the Wisconsin Supreme Court, but it is the law in the very state, Illinois, under whose wrongful death act the instant action is alleged to have been commenced. *Dougherty* v. *McKenna Process Co., supra.*

The defendants' motion for summary judgment dismissing the plaintiff's complaint was properly granted.

By the Court: Judgment affirmed.

APPENDIX "A-1"

(copy)

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

No. 215-551

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes, *Plaintiff*,

v.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin corporation, *Defendants*

October 28, 1949.

Hon. Chas. L. Aarons, Judge

Decision on Defendants' Motion for Summary Judgment

The action is one to recover damages because of the death of Harold G. Hughes by the wrongful act of the defendant Fetter. The defendants have moved for a summary judgment. At the time of the oral argument upon such motion the plaintiff presented a motion to amend his complaint by incorporating certain Illinois statutes governing actions for damages for death by wrongful act; and bearing upon liability and upon the duties of operators of motor vehicles. Such proposed amendment may be considered as allowed.

Defendants' motion for a summary judgment is grounded upon the proposition that the death of Harold G. Hughes (which occurred in Illinois on January 11, 1948) is alleged to have been caused by negligent conduct of the defendant in operating an automobile (in which Harold G. Hughes was a passenger) in Effingham County in the State of Illinois on January 9, 1948. Defendants contend that the action is not one "brought for a death caused in this state" and

is therefore not maintainable by reason of the proviso contained in section 331.03, Wis. Stats. It appears to be conceded that both Hughes (the decedent) and the defendant Fetter were Wisconsin residents at the time of the accident; and that said defendant still resides in this state.

The plaintiff administrator (who was appointed by the County Court of Milwaukee County) predicates his cause of action upon the Illinois death statute. A copy of that statute is contained in Exhibit "A" attached to plaintiff's affidavit in opposition to the motion for summary judgment. A copy is also appended hereto (see page 11).

The Wisconsin statute on the subject is section 331.03 (Stats. 1947). It reads as follows:

> "331.03 *Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*" (Emphasis added)

The sole question presented is whether the instant action is maintainable notwithstanding the above quoted proviso.

Plaintiff contends that the Wisconsin statute is inapplicable since he alleges that he brings his action under the Illinois Wrongful Death Statute. He cites section 391 of the Restatement on Conflict of Laws to the effect that

> "The law of the place of wrong governs the right of action for death";

and section 392:

> "Action for the death of a person will be allowed in any state on a right of action created by the law of

> the place of wrong, if the right of action is given to compensate a person or persons injured by the death for the loss caused thereby."

The Wisconsin annotations supplementing these sections indicate that Wisconsin cases are in accord with the Restatement rule on the subject.

The rule referred to is, however, not in all cases a matter of strict right. It will be so regarded where the right to sue is, under the applicable facts, protected by the "full faith and credit" clause (Sec. 1 of Art. IV) or by Sec. 2 of Art. IV of the U. S. Constitution (the latter section declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"). Where such constitutional sanctions are not involved the principles of comity govern.

> "By the rules of comity, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens." *Disconto Gesellschaft* v. *Umbreit*, 127 Wis. 651, 658 to 660.

By reason of the restricting effect of the proviso in Section 331.03, Wis. stats., the situation here presented is governed by the following rule which in the language of the Restatement of Conflict of Laws, reads as follows:

> "§ 612. *Action Contrary to Public Policy.* No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

See also the substituted Comment (a) to said Section 612 (Conflict of Laws) as contained in the 1948 supplement of the Restatement (p. 175).

Upon an examination of a large number of the decisions bearing upon the subject here considered the court is of the opinion that the principles which prevail in Wisconsin as

well as in Illinois are accurately stated in the following quoted paragraph from Vol. 11 *American Jurisprudence* at page 495:

> "§ 183. *Actions Contravening Public Policy.*—It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere. A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state. Moreover, forbidding the maintenance within the state of actions for personal injuries arising outside the state does not contravene a constitutional provision that every person ought to find a remedy in the law for all injuries and wrongs that he may receive in his person, property, or reputation."

See also the discussion of "*Comity*" in the same work, *11 Am. Jur.*, pages 296-306.

One of the cases referred to in § 183 (above quoted) is *Doughterty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. p. 955. The case presents a close parallel to the instant situation—the only difference being in the phrasing of the Illinois statutory proviso having reference to actions for damages for wrongful death.

In the *Doughterty* case the deceased—a citizen and resident of Illinois—was injured while in the employ of the defendant at Elizabeth, New Jersey and died in the latter state from the effect of his injury. The action was commenced in Illinois by the administrator of the deceased who was appointed by an Illinois Probate Court. The action was however alleged to be based upon a pleaded statute of New

Jersey. Section 2 of the Injuries Act of Illinois provided that

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

The trial court sustained a general demurrer to the complaint because of said proviso in the Illinois Injuries Act. Upon an appeal to the Illinois Supreme Court the plaintiff contended that the statutory provision referred to

> "does not prevent the bringing of an action in this state (Illinois) for death caused by wrongful act in another state, provided it is brought on the statute of such other state and not on the statute of Illinois; that, if this is not the proper construction of the statute above quoted, then such statute is unconstitutional" (99 N. E. page 620).

The court refused to assent to either of said contentions. Quoting (in part) from the opinion of the court (Id. 620, 621):

> "At common law no right of action existed for the recovery of damages for injury resulting in the death of a person caused by another's wrongful act. Such a right of action is statutory. • • • The acts of the Legislature of a state can have, in themselves, no extra-territorial effect. To put the interpretation upon this section now contended for by counsel would practically render it meaningless • • •.
>
> A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state,' and also of paragraph 1 of section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' • • •

It was not intended by the provisions of the federal Constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. * * * *This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity.* In this country the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals, or policy of the forum. (Citing) * * * *If the policy of the forum has been expressed positively in a statute, that policy must prevail.* When the Legislature speaks upon a subject upon which it has constitutional power to legislate, *public policy is what the statute* indicates. (Citing) * * * Each state, subject to restrictions of the federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. (Citing) * * * Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must *operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. In this last case it was held that a statute of Ohio providing that no action could be maintained in that state for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the federal Constitution. A dissenting opinion, joined in by three members of the court, in effect conceded that *had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states it would have been constitutional.* The reasoning of that decision as to the right of a state to exclude actions

of the kind here in question fully sustains the validity, under the federal Constitution, of the provision of the Injuries Act above referred to. * * * (Id. p. 621)

It necessarily follows that the trial court rightly held that the courts of this state were without jurisdiction to entertain this cause of action, and the judgment of that court will be affirmed." (Italics added.)

The above quoted views of the Illinois court authoritatively supported by the U. S. Supreme Court (*Chambers case, supra*) and many other cases cited in the opinion (omitted in the above quotation) also receive sanction in a number of Wisconsin cases although the precise question raised in the instant case has not been passed upon in this state so far as known to the writer. *Finney v. Guy*, 106 Wis. 256 (Syl. 3), 276, 277, 49 L. R. A. 486 (affirmed by U. S. Supreme Court, 189 U. S. 335, 47 L. Ed. 839); *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66, 72 (citing and discussing *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604-606, 36 L. Ed. 829, 833); *Bain v. Northern Pacific R. Co.*, 120 Wis. 412, 418, 419; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 652, 653; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 285; *International Harvester Co.* v. *McAdam*, 142 Wis. 114, 121; *Bartlett v. Collins*, 109 Wis. 477, 482; *Porte v. C. & N. W. R. Co.*, 162 Wis. 446, 451.

It should be noted that the constitutional provision contained in Sec. 2 of Art. IV of U. S. Constitution is applicable in the event there should be any attempted impairment of the right of a citizen of another state to exercise the same right to sue in the courts of Wisconsin *that citizens of Wisconsin* have. *Eingartner v. The Illinois Steel Co.*, 94 Wis. 70; *State ex rel Smith v. Belden*, 205 Wis. 158, 161, 162; *Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 52 L. Ed 143, 146 and 147; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, 360 (where *Mr. Justice Field* says:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as advantages resulting from citizenship in those states are concerned.")

While the language of the proviso in the Illinois statute as quoted in the *Dougherty Case, ante* p. 5, is framed in the negative terms, and also has reference to the state where the death occurred, instead of—as in Wisconsin—to the state where the death was caused, it is not perceived that there is any substantial difference in the effect of the two statutes.

It should be noted not only that both the decedent in the instant case and the defendant were citizens of Wisconsin but that irrespective of such fact there is nothing in the Wisconsin Act (Sec. 331.03) which imposes restrictions upon non-residents which are not likewise imposed upon residents of the state of Wisconsin.

The plaintiff's position in denying the applicability of the Wisconsin statute is also asserted to be based upon the doctrine that "all legislation is *prima facie* territorial and it does not operate beyond the limits of the jurisdiction in which it is enacted." *Bernard v. Jennings*, 209 Wis. 116, 120 (cited in plaintiff's brief). The distinction between the facts of that case and the instant one is obvious and requires no discussion. However, as considerable stress has been placed upon the matter of extraterritorial legislation it may be appropriate to point out

(1) *As to the Wisconsin Statute:* There is no valid ground for asserting that the proviso in question is intended to have force in other states. It has force however whenever *within its own boundaries* claims are asserted which are in contravention of its provision.

(2) *As to the Illinois Statute:* In so far as the enforcement would operate to defeat the Wisconsin statutory provision it can have no force or effect in this state. Otherwise the Illinois statute would be given extraterritorial force.

Plaintiff's counsel directs attention to *Sheehan v. Lewis*, 218 Wis. 588, and other Wisconsin cases where actions for wrongful death—although caused in other states—were maintained in this state. It appears that in those cases the issues involved and considered did not include the specific question here raised. Those cases, therefore, cannot be considered as authoritative upon the question here presented.

In the *Sheehan Case* it appeared that Illinois—where the injury causing death occurred—had a statute prohibiting actions in that state to recover damages for death occurring outside of the state. A doctrine of reciprocity was contended for by the defendant in that case to bar the Wisconsin action, since Illinois under its statutes would have barred an action in that state for a death occurring outside of that state. Our court in disagreeing with that contention quoted the Illinois statutory provision and added: "Wisconsin has no such statute." The court quoted the first paragraph of Sec. 2 of Art. IV, U. S. Constitution, and added: "Citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have." (218 Wis. at page 593). It is apparent that the fact was overlooked that Sec. 331.03 then—as at present—contained the proviso under which an action for damages for death by wrongful act could be maintained only if such action is brought "for a death caused in this state." As above indicated the proviso in order to have any force or effect possesses the same meaning as the negative form appearing in the Illinois statute.

The only case brought to the attention of the court dealing directly with the proviso contained in section 331.03 (then known as section 4255) is *Budiger v. Chicago etc. R. Co.*, 94 Wis. 191. The point determined in that case was that even though the death occurred in another state, action could be maintained in the Wisconsin courts if the death was *caused in* this state. *Id.* 192, 194, 195. The court said:

> "The object and effect of the proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring within the state, without regard to whether the death occurred within or without it." *Id.* 195, 196.

Conclusion

The words "provided that such action shall be brought for a death caused in this state" appearing at the end of the Wisconsin statute (Sec. 330.03) necessarily mean that the right to bring actions for wrongful death (a right non-

existent at common law, *Schwab v. Nelson*, 249 Wis. 563, 565) is granted *only* in cases where the death was caused in this state. It therefore necessarily excludes cases where the death was caused in other states. The statute of another state cannot be made the basis of an action in Wisconsin whose maintenance would be wholly inconsistent with the declared public policy of our legislature. To hold that this action could be maintained notwithstanding the fact that the death was not caused in this state would be to override such public policy as declared by statute; and would operate to deprive the proviso of purpose or meaning. As is shown by the above cited cases the conclusion here reached is not only in accordance with the rule of the U. S. Supreme Court and the Wisconsin Supreme Court but it is the law in the very state (Illinois) under whose wrongful death act the instant action is alleged to have been commenced (*Dougherty Case, ante*, pp. 5-7).

For the reasons stated the defendant's motion for a summary judgment dismissing the complaint must be granted.

(S.) Chas. L. Aarons, Circuit Judge.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1949.

"Exhibit 'A'

Smith and Hurd Illinois Annotated Statutes:

'Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Action—by whom brought—limit of damages—death outside state. Every such action shall be brought by and in the names of the personal representative of such

deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000. Provided that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.'"

APPENDIX "B"

Section 331.03, Wisconsin Statutes:

"Recovery for death by wrongful act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state."

APPENDIX "C"

Illinois Revised Statutes, Chapter 70:

"WRONGFUL DEATH

"AN ACT requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97)

"1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Action—By whom brought—Limit of damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the injury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person.

Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place. As amended by act approved July 18, 1947."